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No. 00-270

IN THE

Supreme Court of the United States

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CLUB MISTY, INC., doing business as
Tequila Roadhouse, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON *
Chief Assistant Corporation Counsel
MYRIAM ZRECZNY
Assistant Corporation Counsel
30 North LaSalle Street
Room 800
Chicago, IL 60602
(312) 744-7764
Attorneys for Petitioners

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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ARGUMENT

Respondents acknowledge the conflict between the Illinois Appellate Court and the Seventh Circuit on whether a liquor license is a property interest protected by the Due Process Clause. They nevertheless make light of it by asserting that the Illinois Supreme Court may not share its appellate court's view. This is flatly incorrect; the appellate decisions rest on the Illinois Supreme Court's holding in *People v. McBride*, 84 N.E. 865, 872-73 (Ill. 1908), that liquor licenses are not property for constitutional purposes because they can be terminated by referendum. The Illinois Supreme Court has

never departed from this view, which has now been rejected by the Seventh Circuit. As we explain in our petition, this unseemly conflict alone merits this Court's review. In addition, there is disagreement between the federal courts of appeals on the question whether a permit is protected by the Due Process Clause when it is issued pursuant to a statutory scheme that explicitly states that it creates no property interest and, to the contrary, creates highly discretionary grounds on which it can be modified, terminated, or revoked.

Even more important, under the decision below, as well as the Sixth Circuit's similar decision in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991), cert. denied, 506 U.S. 820 (1992), a referendum can never be used to deprive a property owner of any form of permit, license, or other governmentally bestowed entitlement. Accordingly, the same reasons justifying the grant of certiorari in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), where the Court held that zoning decisions for even a single parcel may be made by referendum, justify review in this case as well. As we point out in our petition, all States have zoning procedures, and the targeted referendum at issue in this case is comparable to spot zoning, which has long been upheld, as it was in *City of Eastlake* itself. Neither the Seventh Circuit's majority nor respondents have explained how residents—rather than regulators—may control the fate of their communities if the referendum process recognized in *City of Eastlake* cannot be utilized to halt a use of property that the government has previously sanctioned, but which now imperils its neighbors. If inner city communities are to be unable to exercise the power that the referendum gives them to rid their neighborhoods of the problems associated with the activities of liquor licensees that have proven inconsistent with the welfare of the surrounding community, that decision should come from this Court.

1. Remarkably, respondents write that the conflict between the Seventh Circuit and the courts of Illinois exists only because of "a series of Illinois Appellate Court cases." Resp. Br. 10. This view ignores the Illinois Supreme Court's decision in *McBride*, which the appellate court has faithfully followed. Indeed, the Illinois Supreme Court has declined numerous opportunities to revisit *McBride* on petitions for leave to appeal from the very line of appellate decisions that the Seventh Circuit has now rejected. See, *e.g.*, *County of Cook v. Kontos*, 565 N.E.2d 249 (Ill. App. Ct. 1990), appeal denied, 571 N.E.2d 147 (Ill. 1991); *Olé, Olé, Inc. v. Kozubowski*, 543 N.E.2d 178 (Ill. App. Ct.), appeal denied, 548 N.E.2d 1071 (Ill. 1989); *Malito v. Marcin*, 303 N.E.2d 262 (Ill. App. Ct. 1973), appeal denied, 55 Ill. 2d 602, appeal dismissed, 417 U.S. 963 (1974).[1]

This point also disposes of respondents' attempt to downplay the admitted conflict between the decision below and the holdings of the Illinois Appellate Court on the basis that the state courts have not "engaged in any re-analysis of this issue in the aftermath of . . . the many . . . due process decisions of this Court over the past three decades." Resp. Br. 12. This issue did not call for a "re-analysis"—*McBride* rejects the view that liquor licenses confer any sufficiently vested and secure entitlement sufficient to create a property interest for constitutional purposes because they can be voided by referendum, and as we explain in our petition, nothing in *Roth* or any of the other decisions of this Court that respondents invoke calls this reasoning into question. The Illinois Appellate Court has taken just this approach, refusing to alter its view on the question presented here based on its

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[1] Thus, there is no reason to credit respondents' claim "[a]t the moment, we have no idea how the Illinois Supreme Court will deal with the constitutional status of liquor licenses when it has the occasion to address this issue." Resp. Br. 12.

judgment that state law grants liquor licensees no secure or vested rights. See, *e.g.*, *Olé, Olé,* 543 N.E.2d at 181-82; *Black Knight Restaurant, Inc. v. City of Oak Forest*, 513 N.E.2d 109, 111-12 (Ill. App. Ct. 1987).

Respondents similarly argue that the state courts should have retreated from their position by virtue of the Seventh Circuit's earlier decision in *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983). But *Reed* supplied no basis to rethink or question *McBride*—within the year, the Seventh Circuit itself recognized that *Reed* had not settled the question whether Illinois liquor licenses amount to property in the constitutional sense because *Reed* had not considered the fact that they can be voided by referendum. See *Philly's v. Byrne*, 732 F.2d 87, 90-91 (7th Cir. 1984). As the majority below acknowledged, that question was not settled until the decision in this case. See Pet. App. 7a.[2]

Respondents' argument that this Court should wait to see if the state courts reexamine *McBride* before granting review, see Resp. Br. 12-13, is particularly wrongheaded. Under the decision below, the administration of the challenged statute will be enjoined. This issue will never arise again in Illinois; even if voters bothered to place referenda on the ballots in light of the decision below, licensees could quickly obtain injunctions in federal court on the strength of the Seventh Circuit's decision, rendering the views of the state courts academic.[3] The decision below, absent review by this Court,

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[2] Respondents see some significance in our failure to challenge *Reed* and its progeny other than the decision below. See Resp. Br. 14. But as we explain in the petition, we have no reason to quarrel with the precise holding in *Reed* and its progeny, which did not consider whether liquor licenses can be voided by referendum consistent with due process. See Pet. 11 n.6.

[3] Indeed, the soundness of *Reed* itself is also academic and will not likely be subject to future litigation because the Illinois Appellate Court had already construed the Liquor Control Act to require a hearing

has thus sealed the fate of the targeted referendum, just as its fate was sealed in Ohio by the Sixth Circuit's rejection of the state court's view of whether liquor licenses were property in *Brookpark*, which also effectively prevented further use of the Ohio targeted local option statute.[4]

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whenever a licensing authority decides not to renew a liquor license. See Pet. 11 n.6.

[4] Respondents assert that there is no conflict between the Sixth Circuit and the Ohio courts, see Resp. Br. 13 n.2, but this is just wishful thinking. Respondents cite *Scioto Trails Co. v. Ohio Department of Liquor Control*, 462 N.E.2d 1386, 1388-92 (Ohio App. Ct. 1983); and *Rickard v. Ohio Department of Liquor Control*, 504 N.E.2d 724, 732 (Ohio App. Ct. 1986), see Resp. Br. 13 n.2, but those two cases actually held that liquor licensees had no property right to continue to operate a liquor business at a particular location because that right could be terminated by referendum. See *Scioto*, 462 N.E.2d at 1388-92; *Rickard*, 504 N.E.2d at 729, 732. Thus, to the extent those cases suggested that an Ohio liquor license may have some attributes of property, the state courts have made clear that the scope of that interest is limited by the voters' right to terminate the license by referendum. See *Scioto*, 462 N.E.2d at 1391; *Rickard*, 504 N.E.2d at 732. As for the contention that any remaining disagreement is "working itself out," Resp. Br. 13 n.2, the cited cases reveal otherwise. *Hi-Rise, Inc. v. Ohio Liquor Control Commission*, 665 N.E.2d 707 (Ohio Ct. App. 1995), opined in dicta that *Brookpark* made several "points we consider worthy of reconsideration." *Id.* at 711. But in *Bar-Tec, Inc. v. Ohio Department of Liquor Control*, No. 95APE10-1331, 1996 WL 87437 (Ohio Ct. App. Feb. 29, 1996), which, unlike *Hi-Rise* did involve a due process challenge to a local-option decision, the court declined to follow *Brookpark*, concluding that it was bound only by the long line of Ohio Supreme Court decisions declaring that a liquor license is not property. See 1996 WL 87437, at *3-5. And respondents' citation of *State v. Hall*, No. 93AP-346, 1993 WL 310399 (Ohio Ct. App. Aug. 10, 1993), as "relying on *Brookpark* to grant partial relief," is nothing short of misleading. *Hall* was a mandamus action to require the Ohio Department of Liquor Control to reinstate and reissue a liquor license terminated pursuant to a single-premises local option election prior to the *Brookpark* decision. See *id.* at *1. What is more, the Ohio legislature has refused to acquiesce in the *Brookpark* decision. In 1998, it enacted a new targeted local option law, see Ohio Rev. Code Ann. § 4301.32 (Baldwin 2000). In

Especially surprising is respondents' claim that "[t]his case does not present an appropriate vehicle to resolve the conflict between the Seventh Circuit and the Illinois Appellate Court," because we "do not urge reversal based on the reasoning or holding of the Illinois appellate courts." Resp. Br. 14. As we explain above, our submission is based on the reasoning of *McBride*, and the appellate court decisions that the Seventh Circuit has rejected rely on *McBride*. See, *e.g.*, *Olé, Olé*, 543 N.E.2d at 181-82; *Black Knight*, 513 N.E.2d at 111. And because of the square conflict between *McBride* and its progeny and the decision below, we ask the Court to grant certiorari.

2. Respondents similarly belittle the conflict among the federal courts of appeals over the test for whether a governmentally bestowed benefit that is subject to modification or loss can be considered a property interest that the Due Process Clause protects absent individualized notice and hearing. In both *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190 (10th Cir. 1999), and *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716 (8th Cir. 1995), the courts accept that when a license or permit can be terminated simply on the basis that it is no longer thought consistent with some conception of the public interest, it cannot constitute a property interest, even if the license grants quite specific entitlements by its terms. In the Sixth and Seventh Circuits, however, the unfettered discretion inherent

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light of *Brookpark*, however, the statute will not likely survive the Sixth Circuit's review.

As for the tension between state and federal decisions in New Jersey, the federal court perversely relied on a state bankruptcy decision treating a liquor license as property in *Sea Girt Restaurant & Tavern Association, Inc. v. Borough of Sea Girt*, 625 F. Supp. 1482 (D.N.J.), aff'd mem., 802 F.2d 448 (3d Cir. 1986), see Resp. Br. 13-14 n.2, failing to follow decisions of the New Jersey Supreme Court squarely holding that liquor licenses are not property in the constitutional sense. See Pet. 9.

in the referendum process is deemed irrelevant as long as the license by its terms otherwise grants an entitlement.

Respondents focus on the details of regulatory schemes at issue in the various cases to question whether any square conflict between the circuits exists. See Resp. Br. 7-9. Of course, the details of most regulatory schemes will differ, but that should not insulate decisions raising broad questions of constitutional principle from review when the circuits take divergent approaches. The significant question how to reconcile discretion to terminate an existing license with the concept of a property interest within the meaning of the Due Process separates at least the Sixth, Seventh, Eighth, and Tenth Circuits. And in the context of liquor regulation itself, it would stand the Twenty-First Amendment on its head to insist on more factual overlap between the cases before review is granted. That amendment gives the States "broad power" to regulate liquor within their borders. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). But the authority to experiment would become a liability if invalidation of an individual state regulatory scheme could never attract the interest of this Court simply because its details were unique. And as amicus David C. Reitz, Director of the Colorado Liquor Enforcement Commission, explains, the issue whether a liquor license is property is a recurring one on which courts and legislatures alike desire guidance. See Amicus Br. 10-11.

3. This case also presents a good vehicle for deciding the important question whether a referendum is a permissible procedure under the Due Process Clause to terminate a license or other governmentally bestowed entitlement. As we explain in the petition, referenda are a time-honored means for making important policy decisions, even with respect to individual properties. In *City of Eastlake*, this Court endorsed the referendum process in language that would seem to bear quite directly on this case. See 426 U.S. at 679. Even the

Seventh Circuit acknowledged that its decision stood in some tension with *Eastlake* and its progeny, see Pet. App. 11a, but it concluded that referenda may only operate "prospectively," and not remove an existing entitlement. See Pet. App. 12a. The California Supreme Court, however, has rejected this view of *Eastlake*. See *Arnel Development Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980) (holding that land use decisions may be made by referendum directed to a single parcel even when it deprives the parcel's owner of a use to which it was previously entitled). And while only two States have authorized single-address liquor referenda (and few others are likely to do so in light of the Sixth and Seventh Circuit's holdings), all 50 authorize single-address land use decisions.[5]

Respondents attempt to minimize the importance of this case by observing that liquor licenses can be revoked adjudicatively should a licensee pose particular problems for a community. See Resp. Br. 19-20. But this type of policy judgment is not necessarily appropriate for adjudicative resolution, as *Eastlake* recognizes. Even more important, only the referendum process can wrest control over these vital community-based issues away from bureaucrats and regulators, and place it with the people most intimately affected by land-use decisions.

Respondents also observe that the decision below permits precinct-wide referenda. See Pet. 18. The problem with that approach, as Judge Bauer observed in dissent, is that voters should not be forced to remove the licenses of responsible

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[5] Indeed, in light of the venerable history of using referenda to make policy decisions not necessarily suited for adjudicative decision, if review is granted, we will submit that even if a liquor license amounts to property for constitutional purposes, its termination by referendum supplies due process. See Pet. 14-16 & n.6.

businesses in order to eliminate a threat posed by a single "bad apple in the liquor dispensing barrel." Pet. App. 17a.

Perhaps most striking is respondents' assertion that the Seventh Circuit simply applied settled legal principles to the specific facts of this case. See Resp. Br. 17. In fact, this Court has never considered whether a license voidable by referendum is a sufficiently durable entitlement to constitute property for constitutional purposes, and the only targeted referendum ever to come before the Court was upheld in *Eastlake*. As we explain in the petition, if anything this Court's decisions suggest that the decision below is incorrect. See Pet. 9-12. Indeed, to reach its result, the majority below found it necessary to expressly reject the holdings of the Illinois courts, and we are not alone in seeing enormous tension between the decision below and the law in other circuits. See Amicus Br. 8-10. There is nothing settled about the legal principles at stake in this case. And there is nothing insignificant about determining the constitutionality of allowing communities to use a targeted referendum as a separate basis for voiding a liquor license, in addition to the for-cause revocation decisions by a regulatory bureaucracy that all too frequently will be ignorant of or unresponsive to the community's needs.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON *
Chief Assistant Corporation
Counsel
MYRIAM ZRECZNY
Assistant Corporation Counsel
30 North LaSalle Street
Room 800
Chicago, IL 60602
(312) 744-7764
Attorneys for Petitioners

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* Counsel of Record